IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.135 OF 2007

WITH

CIVIL APPLICATION NO.200 OF 2007

Shri Ramesh S.Parkar ...Appellant

Versus

Municipal Corporation of Greater Mumbai & Ors. ...Respondents

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Mr.Madhav J.Jamdar for Appellant.

Mrs.Geeta Joglekar for Respondent No.1.

Mr.G.S.Bhat for Respondent No.3.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 22, 2007.

P.C.

1. Heard Counsel for the Appellant and Respondent No.3. It is agreed that Respondents 1 and 2 are not contesting parties for the purpose of the present proceedings.

2. This Appeal from Order takes exception to the Judgment and Order passed by the Trial Court dated 24th January 2007 dismissing Notice of Motion No.439 of 2004 taken out by the Appellant/Plaintiff. By the said Motion, Appellant/Plaintiff asked for following reliefs :

> "a. That, pending the hearing and final disposal of the petition, this Hon'ble Court be pleased to order or direction or mandatory order directing the defendant No.3 to hand over possession of 15 sq.mt. equivalent to 161.46 sq.ft. area of shop in lieu of old shop No.3A in the new constructed building being 9th shop in sketch at Ex."E" in green colour and as more particularly shown in photographs at Ex."E2" to the plaint situate at 242, Shree Sai Prasad Co-operative Housing Society, M.M.C. Chawl, G.D. Ambekar Marg, Mumbai 400 012.
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> b. That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to appoint Court Receiver, High Court, Bombay or any other fit and proper person or persons as receiver with all power under order Rule 40 of C.P.C. of the premises being 9th shop in sketch at Ex."E" in green colour and as more particularly shown in photographs Ex."E2" to the plaint situate at 242, Shree Sai Prasad Co-operative Housing Society, M.M.C. Chawl, G.D.Ambekar Marg, Mumbai 400 012 and put plaintiff in physical possession of the said premises with out royalty and compensation.
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> c. That, pending the hearing and final

disposal of the petition, this Hon'ble Court be pleased to grant order of injunction restraining defendant No.3 from disposing of and or creating any third party right in respect of Shop admeasuring 15 sq.mt. equivalent to 161.46 sq.ft. area of shop in lieu of old shop No.3A in the new constructed building being 9th shop in sketch at Ex."E" in green colour and as more particularly shown in photographs at Ex."E2" to the plaint situate at 242, Shree Sai Prasad Co-operative Housing Society, M.M.C. Chawl, G.D.Ambekar Marg, Mumbai 400 012.

d. That, ad-interim and interim relief's in terms of prayers (a), (b) and (c) above be granted;

e. Costs be provided for.

f. Such further and other reliefs as the nature and circumstances of the case may require."

3. The Trial Court in the impugned Judgment, in particular Para 8 onwards, has proceeded to consider the case of the Plaintiff on the assumption that the only dispute appears to be in respect of 2 sq.ft. area, excluding the width of constructed walls. This assumption, it is fairly accepted by the Counsel for the Respondent, error apparent on the face of the record. All throughout the case of the Plaintiff has been that he was in occupation of Shop No.3A which was admeasuring 15

sq.mtrs. Plaintiff/Appellant has relied on documentary evidence to support that position. The Court below has not examined that aspect at all in the impugned Judgment. Instead, the Trial Court has considered the matter on the assumption that the Plaintiff was raising dispute only in respect of 2 sq.ft. area.

4. As the basis assumed by the Trial Court is manifestly wrong, instead of examining the other contentious issues, the appropriate course is to set-aside the impugned Judgment and Order passed on Notice of Motion No.439 of 2004 and relegate the parties before the Trial Court for reconsideration of all issues on its own merits in accordance with law.

5. Appeal succeeds on the above terms. All questions on merits are left open.

6. Parties to appear before the Trial Court on 20th March 2007 at 2.30 p.m. on which date, the Trial Court may proceed with the hearing of the restored Notice of Motion No.439 of 2004 or assign

some other date for hearing and ensure that the same is finally disposed of by end of April 2007.

7. Parties shall maintain status-quo with regard to said Shop No.9 till the pendency of the restored Notice of Motion or till such other order to be passed by the Trial Court as may be advised.

8. Appeal and the companion Civil Application stand disposed of accordingly.

A.M.KHANWILKAR, J.